No. _____

In the Supreme Court of the United States

RICHARD LIVINGSTON,

Petitioner,

v.

DOUGLAS J. CURTIS, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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Appendix A
[Filed: Oct. 3, 2025]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD L. LIVINGSTON, Petitioner - Appellant, v. DOUGLAS J. CURTIS, Commandant, United States Disciplinary Barracks, Respondent - Appellant.	No. 24-3128 (D.C. No. 5:23-CV-03162-JWL) (D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **BACHARACH**, Circuit Judges.**

Petitioner-Appellant Richard Livingston, a former Army warrant officer, appeals from the district court's

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.l(G). The case is therefore ordered submitted without oral argument.

denial of his petition for a writ of habeas corpus seeking to vacate his court-martial convictions. 28 U.S.C. § 2241. On appeal, he argues that the writ should issue because the court-martial did not reach unanimous findings and a non-verbatim transcript placed his sentence beyond the jurisdiction of the court-martial. Our jurisdiction arises under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

Background

On July 29, 2019, a military judge sitting alone as a general court-martial convicted Mr. Livingston of several violations of the Uniform Code of Military Justice (UCMJ) pursuant to guilty pleas. I Aplt. App. 14. On August 1, 2019, a panel of officers convicted Mr. Livingston, contrary to his pleas of not guilty, of rape, sexual assault (two specifications), aggravated sexual contact, assault consummated by a battery (two specifications), assault upon a commissioned officer (six specifications, three of which Mr. Livingston pled guilty), conduct unbecoming an officer and a gentleman (three specifications), and obstructing justice, all in violation of the UCMJ. Id.

Mr. Livingston appealed to the Army Court of Criminal Appeals (ACCA). United States v. Livingston, No. ARMY 20190587, 2022 WL 705828, at *l (A. Ct. Crim. App. Mar. 8, 2022), rev. denied, 82 M.J. 440 (C.A.A.F. July 25, 2022) ("Livingston I"). While his appeal was pending, the Supreme Court held that the Sixth Amendment right to a jury trial requires unanimous verdicts in state courts. Ramos v. Louisiana, 590 U.S. 83, 93 (2020). Mr. Livingston subsequently added more claims to his appeal, including a claim that Ramos extends to military tribunals and thus renders

unconstitutional his convictions via the nonunanimous officer panel process. I Aplt. App. 256-68.

The ACCA set aside one conviction but otherwise affirmed the court-martial's findings and the constitutionality of the convictions, stating that it had "given full and fair consideration" to the arguments presented but that the arguments "lack merit and warrant neither discussion nor relief." Livingston I, 2022 WL 705828, at *1 n.2. The court confirmed Mr. Livingston's sentence as a term of confinement for sixteen years and eleven months. Id. at *8. The U.S. Court of Appeals for the Armed Forces (CAAF) denied further review. United States v. Livingston, 82 M.J. 440 (C.A.A.F. 2022). However, that same day the CAAF granted review in United States v. Anderson, later holding that nonunanimous court-martial verdicts are constitutional. 83 M.J. 291, 293 (C.A.A.F. 2022), cert. denied, 144 S. Ct. 1003 (2024).

On July 6, 2023, Mr. Livingston filed the instant petition challenging his convictions on three grounds: (1) his sexual assault conviction is supported by inadmissible hearsay; (2) the military courts lacked jurisdiction to affirm his sentence because the record of trial is not substantially verbatim, based on a missing transcript of a pretrial session; and (3) the court-martial deprived him of due process by instructing the panel that it could convict on the basis of a nonunanimous verdict. I Aplt. App. 17, 27, 29.

On January 9, 2024, the district court denied Mr. Livingston's first two claims for relief and stayed proceedings on the third claim. Livingston v. Payne, No. 23-3162, 2024 WL 95205, at* 1 (D. Kan. Jan. 9, 2024) ("Livingston II"). Regarding the second claim, the district court found that Mr. Livingston "failed to

persuade the [c]ourt that any non-transcribed hearing occurred." Id. at *3. In a separate order on July 8, 2024, the district court denied Mr. Livingston's third claim for relief. Livingston v. Payne, No. 23-3162, 2024 WL 3328584, at* 1 (D. Kan. July 8, 2024). Because Mr. Livingston already raised the nonunanimous jury issue on direct appeal to the ACCA and CAAF, the district court considered only whether "the military justice system [had] failed to give full and fair consideration to the petitioner's claims." Id. at *2 (quoting Santucci v. Commandant, U.S. Disciplinary Barracks, 66 F.4th 844, 855 (10th Cir. 2023), cert. denied, 144 S. Ct. 191 (2023)). Finding full and fair consideration, the district court denied Mr. Livingston's petition. Id. at *4.

Discussion

We review de novo a district court's decision denying habeas relief. Santucci, 66 F.4th at 871. Mr. Livingston raises two issues on appeal. First, he maintains that the court-martial did not reach unanimous findings, a defect of constitutional proportions. Aplt. Br. at 10.[1] Second, he asserts that the military courts lacked jurisdiction to affirm a sentence in excess of six months because the military trial record is not substantially verbatim. Id. at 20.[2]

A. Nonunanimous Verdict

Article 52(a) of the UCMJ permits conviction by "at least three-fourths of the members present" at a court-

[1] Mr. Livingston's opening brief does not include page numbers. We instead cite to the PDF pages.

[2] Mr. Livingston does not raise the hearsay issue on appeal.

martial. 10 U.S.C. § 852(a)(3).[3] Mr. Livingston argues that the court-martial process violated his constitutional rights because it did not require unanimous findings and that the military courts did not fully and fairly consider the issue. Aplt. Br. at 14.

In habeas proceedings challenging court-martial convictions, Article III courts serve the "limited function" of reviewing "whether the military have given fair consideration to each" claim. Burns v. Wilson, 346 U.S. 137, 144 (1953). "[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." Id. at 142. Article III courts may review the merits of the claim only if the military court "failed to give full and fair consideration to the petitioner's claim[]." Santucci, 66 F.4th at 855; see also Burns, 346 U.S. at 142.

This court applies a four-factor test known as the "Dodson factors" from Dodson v. Zelez to determine whether to review the merits of a military habeas claim. 917 F.2d 1250, 1252-53 (10th Cir. 1990). The factors are:

1. The asserted error must be of substantial constitutional dimension[,]
2. The issue must be one of law rather than of disputed fact already determined by the military tribunals[,] 3. Military considera-

[3] Although Mr. Livingston contends that this provision is unconstitutional, it is unclear whether his verdict was unanimous or not. The president of the court-martial panel and court-martial documents did not report the vote tally on any specification and the findings worksheet does not so reflect. I Aplt. App. 264.

> tions may warrant different treatment of constitutional claims[,] 4. The military courts must give adequate consideration to the issues involved and apply proper legal standards.

Id. (quoting Calley v. Callaway, 519 F.2d 184, 199-203 (5th Cir. 1975)). To be eligible for merits review, a petitioner must demonstrate that each factor weighs in his or her favor—meaning that each factor suggests that the military tribunal did not give full and fair consideration to the claim. Santucci, 66 F.4th at 856, 859. The fourth factor, adequate consideration, is the most important. See id. at 858. But the failure to show that any one factor weighs in his or her favor precludes a full merits review. Id. We now consider each factor in turn.

Mr. Livingston satisfies the first Dodson factor because his claim implicates substantial issues under the Fifth and Sixth Amendments. The government disagrees arguing that there is no right to a unanimous verdict in court-martial proceedings. Aplee. Br. at 16. But that goes to the merits. Contrary to the government's approach, the Dodson factors serve a gatekeeping function before we can reach merits. See Santucci, 66 F.4th at 856. The first factor asks only whether the "claim is of a constitutional dimension," meaning whether the claim raises constitutional issues, not whether the constitutional claim is meritorious. Accordingly, the first Dodson factor weighs in favor of review.

The government concedes that the second Dodson factor is met. Aplee. Br. at 27. We agree that the unanimous jury claim presents a pure issue of law for the

court to decide, and thus this factor weighs in favor of review.

As for the third factor, Mr. Livingston fails to argue that military considerations do not warrant a different treatment of his claim. See generally Aplt. Br.; Aplt. Reply Br. This omission alone could preclude merits review because Mr. Livingston has the burden of showing that each Dodson factor weighs in his favor. See Santucci, 66 F.4th at 857. Even so, there likely are military considerations that support a different standard for military court verdicts. As the CAAF explained in Anderson, courts-martial have used nonunanimous verdicts since the founding of the military justice system. Anderson, 83 M.J. at 294. And the Anderson court accepted that "nonunanimous verdicts in the military are necessary to promote efficiency in the military justice system and to guard against unlawful command influence in the deliberation room." Id. at 302. Such rationales likely support different treatment.

But it is Mr. Livingston's failure to satisfy the fourth Dodson factor that is fatal to proceeding to merits review. The fourth factor, which we have characterized as "the most important" factor, asks whether the military tribunal gave adequate consideration to the issues and applied proper legal standards. See Santucci, 66 F.4th at 858, 875 (quoting Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 671 (10th Cir. 2010)).

The ACCA summarily rejected the unanimity claim on direct appeal. The court stated that it gave the claim "full and fair consideration" and that the claim "lack[ed] merit and warrant[ed] neither discussion nor relief." Livingston I, 2022 WL 705828, at *1 n.2. A

military court's summary rejection of a claim does not automatically indicate that the court failed to give adequate consideration, a point which Mr. Livingston does not dispute. See Thomas, 625 F.3d at 671. We have "consistently held full and fair consideration does not require a detailed opinion by the military court." Id. And in fact, Mr. Livingston does not seem to challenge that the ACCA adequately considered the issue beyond generally challenging that the ACCA's reasoning is unknown. See Aplt. Br. at 18—20. Rather, Mr. Livingston focuses on the second part of this factor—that the court applied proper legal standards—and contends that the ACCA could not have reached its conclusion from a reasonable application of the correct legal standard. See id. And the correct legal standard, Mr. Livingston argues, is that the Fifth and Sixth Amendments require unanimity in military tribunals. See id.

Much like the government's approach to the first Dodson factor, Mr. Livingston's argument asks us to address the merits of the issue prematurely. Rather than focusing on whether the ACCA applied the correct legal test—that is, any tests under the Fifth and Sixth Amendments that dictate whether military verdicts require unanimity—Mr. Livingston takes issue with the legal conclusion. In fact, "it would be contrary to our precedents to interpret the 'apply proper legal standards' language to require that we assess the merits of the habeas claim[.]" Drinkert v. Payne, 90 F.4th 1043, 1048 (10th Cir. 2024).

There is no basis to suggest that the ACCA failed to consider the Fifth and Sixth Amendments or that it was improper to consider the Fifth and Sixth Amendments. Although the ACCA summarily rejected Mr.

Livingston's claim, we defer to the military court's determination that the claim was not meritorious when that claim is briefed and argued before the military court. See Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986). We do not "presume a military appellate court has failed to consider all the issues presented to it before making a decision." Thomas, 625 F.3d at 672. Accordingly, Mr. Livingston has not shown that the fourth Dodson factor weighs in his favor, and he is not entitled to merits review. We reject Mr. Livingston's nonunanimous jury claim.

The throughline across Mr. Livingston's appeal is Ramos, in which the Supreme Court held that the Sixth Amendment right to a jury trial requires unanimous verdicts in state courts. 590 U.S. at 93. Because Mr. Livingston failed to show that the Dodson factors weigh in his favor, we do not reach the merits of his claim to consider whether Ramos extends to military courts. We note only that the Supreme Court has recognized that the Sixth Amendment right to a jury trial does not apply in the military justice system. See, e.g., Ex parte Milligan, 71 U.S. 2, 123 (1866); Whelchel v. McDonald, 340 U.S. 122, 127 (1950). We have recognized the same, as have other circuits. See, e.g., Dodson, 917 F.2d at 1253; Betonie v. Sizemore, 496 F.2d 1001, 1007 (5th Cir. 1974); Daigle v. Warner, 490 F.2d 358, 364 (9th Cir. 1973); Wright v. Markley, 351 F.2d 592, 593 (7th Cir. 1965).

B. Substantially Verbatim Record

The Rules for Courts-Martial (R.C.M.) state that there must be a "substantially verbatim recording" of the proceedings and that there must be a "certified verbatim transcript of the record" when the judgment

includes confinement for more than six months. See R.C.M. 1112, 1114 (2024 ed.). "A verbatim transcript must include 'all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge." 'United States v. Tate, 82 M.J. 291, 294 (C.A.A.F. 2022) (quoting R.C.M. l103(b) Discussion (2016 ed.)). The CAAF has "repeatedly held that a transcript need not be actually verbatim but will suffice when it is substantially verbatim." Id. In assessing the record, the "threshold question" is whether the omitted material was qualitatively or quantitatively substantial. Id. at 295. An omission is qualitatively substantial if it relates to the sufficiency of the government's evidence on the merits. See id. And an omission is quantitatively substantial unless, viewing the totality of all omissions, the omissions are "so unimportant and so uninfluential" in light of the whole record such that the omissions "approach[] nothingness." See id. (quoting United States v. Nelson, 3 C.M.A. 482, 487 (1953)).

Mr. Livingston argues that the military court lacked jurisdiction to sentence him to sixteen years and eleven months confinement because the trial record is not substantially verbatim. Aplt. Br. at 20. He claims that the trial record is missing a transcript from an Article 39(a) session where he was arraigned and entered his forum selection. Id. at 22-23. Both the ACCA and the district court rejected this claim. Livingston I, 2022 WL 705828, at *1 n.2; Livingston II, 2024 WL 95205, at *4.

As a preliminary matter, the parties disagree on whether the verbatim transcript requirement is a jurisdictional one, and thus on whether the Dodson analysis applies. See Fricke v. Sec'y of Navy, 509 F.3d

1287, 1289-90 (10th Cir. 2007) (clarifying that jurisdictional issues and constitutional issues are separate grounds for review and declining to apply the "full and fair consideration" standard to a jurisdictional issue). However, we need not decide whether the Dodson factors apply given the district court's finding that there is no missing transcript. Livingston II, 2024 WL 95205, at *3.

Mr. Livingston contends that an unrecorded Article 39(a) session took place between the recorded May 14, 2019 and July 22, 2019 sessions. Aplt. Br. at 24-25. In support of his argument, he points to a statement that the military judge made at the July 22 hearing, in which the judge referenced a "previous session" at which he "informed [Mr. Livingston] of [his] forum rights" and confirmed that Mr. Livingston had entered not guilty pleas. Id. at 25; I Aplee. Suppl. App. 66-67.

But the record does not support the existence of an extra unrecorded session. During his March 7 arraignment, the judge did inform Mr. Livingston of his right to be tried by a panel or military judge (the forum issue) and granted Mr. Livingston's request to defer forum until a later date. I Aplee. Suppl. App. 19. At that same hearing, the judge also informed Mr. Livingston of the charges and granted his request to defer entry of pleas until a later date. Id. at 19, 32. Then, on April 17, Mr. Livingston submitted a written indication of his pleas of not guilty and his forum selection of an officer panel. Id. at 90. As discussed above, on July 22, the judge referred to a "previous session" at which he advised Mr. Livingston of his forum selection rights, noted his forum selection choice to be tried by a panel, and confirmed that he had entered pleas of not guilty.

Id. at 66-67. Considering this timeline, the district court found that on July 22 the military judge was most likely referring to the March 7 colloquies he had with Mr. Livingston about plea and forum selection rights, and also to the April 17 written indications filed by Mr. Livingston. Livingston II, 2024 WL 95205, at *3. This finding is supported by the senior court reporter's affidavit stating that the only pretrial court sessions took place on March 7, May 14, and July 22, sessions for which there are recorded transcripts. I Aplee. Suppl. App. 100. Further, Mr. Livingston himself does not indicate a date on which the allegedly missing Article 39(a) session occurred, even though he was presumably in attendance.

Even if the substantially verbatim record requirement is jurisdictional, we would affirm the district court's judgment given its finding that there was no missing transcript. In the alternative, and even assuming that Mr. Livingston could satisfy the Dodson factors, we would affirm because the military courts sentenced based upon a substantially verbatim record.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

Appendix B
[Filed: Nov. 18, 2025]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD L. LIVINGSTON, Plaintiff-Appellant, v. DOUGLAS J. CURTIS, Commandant, United States Disciplinary Barracks, Defendant-Appellant.	No. 24-3128 (D.C. No. 5:23-CV-03162-JWL) (D. Kan.)

ORDER

Before **MATHESON**, **KELLY**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Per Curiam

Appendix C
[Filed: Jul. 8, 2024]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RICHARD L. LIVINGSTON, Petitioner, v. KEVIN PAYNE, Commandant, United States Disciplinary Barracks, Respondent.	)	Case No. 23-3162-JWL

MEMORANDUM AND ORDER

Petitioner, a military prisoner, filed through counsel a petition for habeas corpus under 28 U.S.C. § 2241, in which he challenges certain convictions and his sentence imposed by a court martial. The Court previously denied two of petitioner's three claims, while staying petitioner's third claim relating to the lack of a requirement of a unanimous panel verdict. *See Livingston v. Payne*, 2024 WL 95205 (D. Kan. Jan. 9, 2024) (Lungstrum, J.). The Court subsequently lifted the stay, and the parties completed the briefing with respect to the third claim. For the reasons set forth below, the Court **denies** petitioner's third claim, and the petition is therefore denied in its entirety.

I. Background

In 2019, petitioner pleaded guilty to certain offenses and was convicted of other offenses – including rape and sexual assault – in a court martial after a trial before a panel of officers. On direct appeal, the United States Army Court of Criminal Appeals (ACCA) set aside one conviction, but it affirmed petitioner's other convictions, of which rulings the United States Court of Appeals for the Armed Forces (CAAF) denied review. *See United States v. Livingston*, 2022 WL 705828 (Army Ct. Crim. App. Mar. 8, 2022), *rev. denied*. 82 M.J. 440 (Ct. App. Armed Forces July 25, 2022). In its opinion, the ACCA specifically addressed particular arguments raised on appeal, but it summarily rejected other arguments by petitioner, stating that it had "given full and fair consideration" to those arguments and that those arguments "lack merit and warrant neither discussion nor relief." *See id.* at * 1 n.2. Petitioner's eventual sentence included a term of confinement for 16 years and 11 months, and petitioner is presently imprisoned within this judicial district.

Petitioner, through counsel, filed the present petition for habeas relief in July 2023. The parties briefed petitioner's first two claims, which the Court then denied. Upon the parties' request, however, the Court stayed litigation of petitioner's third claim – that the trial court erred in failing to require the panel to convict him by unanimous verdict – pending final resolution of appeals in a case decided by the CAAF involving the same issue. *See United States v. Anderson*, 83 M.J. 291 (Ct. App. Armed Forces 2023), *cert. denied*, 144 S. Ct. 1003 (2024). After the Supreme Court

denied the petition for certiorari in *Anderson*, the Court lifted the stay, and the parties filed further briefs. That claim is now ripe for resolution.

II. Analysis

The Court begins by considering whether it may review the merits of this claim, in light of the fact that petitioner asserted the same claim on direct appeal to the ACCA and the CAAF, both of which rejected the claim.[1] In 2023, the Tenth Circuit clarified and reaffirmed the standard for a district court's consideration of a habeas petition filed by a military prisoner convicted by court martial. *See Santucci v. Commandant*, 66 F.4th 844, 852-71 (10th Cir.), *cert. denied*, 144 S. Ct. 191 (2023). Other than questions of jurisdiction, a district court may consider the merits upon habeas review only if "the military justice system has failed to give full and fair consideration to the petitioner's claims." *See id.* at 855 (citing *Burns v. Wilson*, 346 U.S. 137, 142 (1953)). A court determines whether such full and fair consideration has been given by examining the following four factors (referred to as the *Dodson* factors):

> 1. The asserted error must be of substantial constitutional dimension. 2. The issue must be one of law rather than of disputed fact

[1] Respondent state that petitioner raised this issue concerning the requirement of unanimity in *Grostefon* briefs submitted to both the ACCA and the CAAF. With respect to the appeal to the ACCA, however, respondent's attachments include only petitioner's reply brief, which does not contain any discussion of the *Grostefon* issues, and do not include the *Grostefon* brief submitted to the ACCA. Petitioner does not dispute, however, that he did raise the issue on direct appeal to the ACCA.

> already determined by the military tribunals. 3. Military consideration may warrant different treatment of constitutional claims. 4. The military courts must give adequate consideration to the issues involved and apply proper legal standards.

See id. at 856 (quoting *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990)). Military petitioners must establish that all four factors weigh in their favor in order to have the merits of their claims reviewed. *See id.* "Putting the matter differently, petitioners' failure to show that even one factor weighs in their favor is fatal to their efforts to secure full merits review." *See id.* at 585. The Court addressees the four factors in turn.

Petitioner satisfies the first factor because his unanimity claim raises substantial issues under the Fifth and Sixth Amendments to the United States Constitution. Respondent argues that petitioner cannot establish this factor because in fact there is no constitutional right to a unanimous verdict in military courts. The Court does not review the merits of the claim, however, in deciding whether these requirements for a merits review have been satisfied. *See Drinkert v. Payne*, 90 F.4th 1043, 1048 (10th Cir. 2024). The error *asserted* by petitioner is of substantial constitution dimension, and this petitioner has satisfied the first *Dodson* factors.[2]

As conceded by respondent, petitioner satisfies the second *Dodson* factor because this claim presents a

[2] The Court would encourage this respondent not to continue to make this argument in cases in which the petitioner's *claim* is of a substantial constitutional violation.

pure issue of law, namely, whether the Constitution requires a unanimous verdict for a court-martial conviction.

Respondent disputes that petitioner can satisfy the third *Dodson* factor in this case. Respondent argues that military considerations "clearly" warrant a different treatment of this claim. In support of that argument, respondent notes that the Supreme Court has emphasized the differences between military and civilian justice systems, and it asserts that a non-unanimous verdict, "like other matters relating to the organization and administration of court-martial panels, is a matter appropriate for congressional action." Respondent has not actually identified any specific military consideration, however, that warrants a different treatment with respect to whether a unanimous verdict should be required. The Court tends to agree with petitioner that it is incumbent on respondent at least to identify such an issue, as it is more difficult for petitioner to prove the negative (that is, that there are no military considerations warranting different treatment). At any rate, the Court need not decide whether petitioner has met this requirement in light of its conclusion that petitioner cannot satisfy the fourth *Dodson* factor.

With respect to the fourth *Dodson* factor, petitioner disputes that the military courts gave his claim adequate consideration. As noted above, petitioner raised the issue on appeal to the ACCA, but the ACCA summarily rejected that argument; and petitioner raised the issue again in his petition for review, but the CAAF rejected the argument by denying review of the ACCA's ruling.

Petitioner argues that the fact that his claim was raised and rejected on direct appeal is not dispositive under Tenth Circuit law. Rather, he argues that the Tenth Circuit has held only that a summary rejection of a claim by the military courts does not mean that those courts *failed* to give the claim adequate consideration. Petitioner relies on language from the Tenth Circuit's opinion in *Thomas v. United States Disciplinary Barracks*, 625 F.3d 667 (10th Cir. 2010) – a case often cited with respect to this fourth factor. In *Thomas*, the court quoted its conclusion from *Watson v. McCotter* (a previous case that is also often cited with respect to this factor) that "when an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion." *See id.* at 671 (quoting *Watson v. McCotter*, 782 F.2d 143, 143 (10th Cir. 1986). Petitioner here especially relies on the *Thomas* court's statement that it "decline[d] to presume a military appellate court has failed to consider all the issues presented to it before making a decision." *See id.* at 672. The court elaborated in *Thomas* as follows:

> Although our review of court-martial proceedings is narrow, it is not illusory. In *Watson*, we predicated our holding that full and fair consideration does not require a detailed opinion or certain other indications that a military court diligently reviewed the parties' arguments. In a case where the briefing is cursory and no indications of full

> consideration otherwise exist, we may reach a different result.

See id.

In recent cases, however, the Tenth Circuit has consistently stated that this factor weighs against the petitioner when the military courts have summarily rejected a claim that was briefed to them. *See Santucci*, 66 F.4th at 875; *Bales v. Commandant*, 2023 WL 3374118, at *7 (10th Cir. May 11, 2023) (unpub. op.); *Allen v. Payne*, 2023 WL 8368896, at *4 (10th Cir. Dec. 4, 2023) (unpub. op.); *Drinkert v. Payne*, 90 F.4th 1043, 1046-47 (10th Cir. 2024). Thus, in *Santucci* the Tenth Circuit inferred that the ACCA had conducted a reasonably thorough evaluation of a claim asserted on appeal even though the ACCA did not comment directly on that claim in its opinion. *See Santucci*, 66 F.4th at 875-76. The Tenth Circuit in that case noted that the petition had not pointed to anything in the ACCA's analysis that would cause it to question whether the ACCA actually reviewed the claim. *See id.* at 876. Similarly, in *Allen*, the Tenth Circuit concluded that the petitioner had not made a sufficient showing with respect to the fourth *Dodson* factor because he had fully briefed the issues to the ACCA and CAAF, which courts summarily rejected the claims and denied review respectively. *See Allen*, 2023 WL 8368896, at *4-5. In *Drinkert*, the Tenth Circuit noted that in applying the fourth *Dodson* factor, it "ordinarily focus[es] only on how the issue was presented to the military court, without consideration that court's reasoning, or even its conclusion." *See Drinkert*, 90 F.4th at 1046-47.

Therefore, it is clear under Tenth Circuit precedent that there can be full and fair consideration of a claim in the military courts even if that claim is summarily rejected. Petitioner argues that that is not always the case; but petitioner has not shown or even suggested why the military courts did not adequately consider the claim in this particular case. Petitioner does not dispute that the unanimity issue was briefed to both the ACCA and the CAAF,[3] and the ACCA stated that it did consider all such issues fully and fairly. Petitioner has not pointed to anything that would cast doubt on that statement by the ACCA. Accordingly, petitioner has not shown that the military courts failed to give adequate consideration to the issue.

As noted above, the fourth *Dodson* factor also requires the military courts to "apply proper legal standards." The Tenth Circuit has clarified that it is not enough for a petitioner merely to argue that the military courts failed to apply the proper standard correctly; rather, the petition must show that the military courts did not identify and apply the standard that governs the inquiry. *See Drinkert*, 90 F.4th at 1048-49. Petitioner argues that, although it is "unclear what standard the military courts applied" in his case, they must not have applied the proper standard of "strict scrutiny" because they "erroneously considered that the matter was not one of constitutional importance." Petitioner has no basis for that assertion, however; as petitioner notes, the ACCA did not

[3] Petitioner has not suggested that the briefing was cursory or lacking in argument. Petitioner's briefing of the issue to the CAAF spanned multiple pages and included multiple citations, including citation to *Ramos v. Louisiana*, 590 U.S. 83 (2020), the Supreme Court case on which petitioner primarily relies.

explain its summary rejection of the claim, and thus petitioner cannot show that the ACCA applied an incorrect standard. Petitioner's claim – that the Due Process Clause, the Equal Protection Clause, or the Sixth Amendment requires a unanimous verdict in a court martial – itself identifies the applicable standards, and there is no basis to conclude that the ACCA did not consider petitioner's unanimity claim under the standards of the Fifth and Sixth Amendments.[4]

Accordingly, because petitioner has failed to establish that the fourth *Dodson* factor weighs in his favor, the Court may not review the merits of his present claim. The Court therefore denies the petition in its entirety.

IT IS THEREFFORE ORDERED BY THE COURT THAT the petition for habeas corpus relief under 28 U.S.C. § 2241 is hereby **denied**.

IT IS SO ORDERED.

Dated this 8th day of July, 2024, in Kansas City, Kansas.

/s/ John W. Lungstrum
Hon. John W. Lungstrum
United States District Judge

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[4] Moreover, even if it *could* be determined whether the ACCA refused to apply a standard of strict scrutiny to the equal protection claim (it cannot), that refusal would not be sufficient here, as that court could have resolved the claim on another basis – for instance on the basis that court-martial defendants are not similarly situated to other criminal defendants – without determining the applicable level of scrutiny.

Appendix D
[Filed: Mar. 8, 2022]

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Chief Warrant Officer Three RICHARD L. LIVINGSTON United States Army, Appellant

ARMY 20190587

Headquarters, Fort Bliss
Michael S. Devine, Military Judge
Colonel Sean T. McGarry, Staff Judge Advocate

For Appellant: Captain Joseph A. Seaton, Jr., JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. De Vega, JA (on brief).

8 March 2022

MEMORANDUM OPINION

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[1] Judge Arguelles decided this case while on active duty.

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

BROOKHART, Senior Judge:

A military judge sitting alone as a general court-martial found appellant guilty, in accordance with his pleas, of one specification of willful disobedience of a superior commissioned officer, one specification of making a false official statement, one specification of conduct unbecoming of an officer and a gentleman; and one specification of obstructing justice, in violation of Articles 90, 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 907, 933, 934 [UCMJ]. Appellant also pleaded guilty to three specifications of assault consummated by a battery, each as a lesser-included offense of three charged specifications of assault upon a commissioned officer, in violation of Article 128, UCMJ. The military judge did not enter findings on appellant's plea to Article 128, UCMJ, offenses because the government moved forward with the greater charged offense.

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted appellant of one specification of rape,, two specifications of sexual assault, one specification of aggravated sexual contact, two specifications of assault consummated by battery, six specifications of assault upon a commissioned officer (including the three to which appellant pleaded guilty to assault consummated by a battery), three specifications of conduct unbecoming an officer and a gentleman, and one specification of obstruction of justice, in violation of Articles 120, 128, 133, and 134, UCMJ. The military judge conditionally dismissed one specification of sexual assault which had been charged in

the alternative. The panel sentenced appellant to a dismissal from the service, seventeen years confinement, forfeiture of all pay and allowances, and a reprimand. The convening authority approved the adjudged sentence.

Appellant raises eight assignments of error, only two of which merit discussion and only one relief.[2]

BACKGROUND

Appellant, a helicopter pilot was married to the first victim ("V1") in 2006. V1 was a commissioned officer and also a pilot. They had two children, both under the age of 10 years during the relevant timeframe. In August of 2014, at Fort Rucker, Alabama, appellant physically assaulted V1 during a verbal argument over information on appellant s cell phone which escalated to the point the two were engaged in. wrestling type physical contact in their living room. At one point, V1 moved into the bedroom and took a firearm from the nightstand which she pointed at appellant, who was dose behind. Appellant disarmed V1, threw her on the bed, where he then kneed her ribs and punched her in the chest multiple times. V1 did not report the assaults. She did seek medical treatment for her bruised ribs a few days after the assault but claimed she slipped and fell onto a bannister in the home.

Appellant and V1 divorced in October of 2014. However, they resumed their relationship sometime in

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[2] We have given full and fair consideration to appellant's other assignments of error, to include matters submitted personally by appellant pursuant to *United States v. Grastefon* 12 M.J. 431 (C.M.A. 1982). and find they lack merit and warrant neither discussion nor relief.

2016. In November of 2016, appellant and V1 had another argument which turned physical with appellant choking V1 until she blacked out momentarily. After V1 regained consciousness, appellant insisted on having sex. V1 did not want to have sex but gave in out of fear that appellant would cause her further harm. V1 did not report these assaults.

Despite the assault in 2016, appellant and V1 remarried in 2017. However, V1 was deployed for much of the time they were married for the second time. In January of 2018, V1 returned from her deployment and appellant again physically assaulted her by pushing her to the ground and punching her in the face. Again, V1 did not seek to report the assault; however, in this instance, a member of her unit reported the abuse based on V1's visible injuries. An investigation ensued. During the investigation, V1 revealed that sometime shortly before they divorced in 2014 she learned appellant was having a relationship with another officer that continued while they were divorced. V1 also revealed that she had discovered nude photos and videos of the other officer, identified as ("V2"), on a memory stick in appellant's night stand. V1 suggested investigators contact V2 because appellant had admitted that he once assaulted V2.

Investigators located V2, who was an Army captain and also a pilot. V2 revealed that she met appellant in 2014 while they were both deployed to Honduras and that they had a dating and sexual relationship that lasted into 2016. Appellant was still married when his relationship with V2 began and they were both reprimanded by their command for their inappropriate relationship. Nonetheless, after the deployment, they both ended up stationed at Fort Bliss, Texas, and the

relationship continued at that installation, although appellant was now divorced. In September of 2015, appellant and V2 went to an Oktoberfest event on post. When they returned, both were intoxicated. They then had an argument which turned physical. Appellant physical assaulted V2 by punching and choking her by the neck. He also pinned her to the floor and rubbed his knuckles into her bare sternum until he drew blood. At one point, appellant spread V2's legs and punched her in the genitals stating words to the effect of "[y]ou probably liked that." Appellant then pulled off V2's pants and raped her before passing out.

V2 escaped the house and hid for a time by the trashcans alongside the house. Appellant had taken her cell phone and car keys so she did not believe she could go any further. Appellant eventually found her outside his house and brought her back in where he continued to physically assault her. During the assaults, appellant threatened to ruin V2's career by sending nude photos to the unit if she reported the assault. He also took a video of her balled up on the floor crying during the assault and threatened to send that as well. The next morning appellant indicated he had blacked out and claimed he did not recall harming V2.

After the encounter, V2 continued the dating and sexual relationship with appellant into 2016. During this timeframe, V2 sent appellant numerous nude photos of herself and made a sex tape with appellant in which she is seen putting his hand on her throat while they engage in intercourse. In may of 2016, appellant again physically and sexually assaulted V2. In this instance, after taking her cell phone, appellant punched V2, and choked her until she lost consciousness. After she woke up, appellant penetrated her

vagina with his penis while she was in fear. After appellant sexually assaulted V2, he returned her phone and she contacted police to escort her from appellant's home. No arrest was made and no charges were filed. V2 ended the relationship after the second violent encounter and eventually took an assignment at another post. She did not further report either assault and appellant reunited with V1.

During the investigation which followed, appellant disobeyed an order from his command regarding contacting V1. He also made false statements about his assaults on V1 and obstructed justice by encouraging V1 to do the same. Appellant was eventually charged with a litany of offenses including rape, sexual assault,[3] aggravated assault, assault consummated by a battery, false official statement, obstruction of justice, and conduct unbecoming an officer.

At trial, both V1 and V2 testified. Although other witnesses testified at trial on various ancillary matters, no witness other than the victims were present during any of the physical or sexual assaults. Therefore, their testimony constituted the primary evidence of appellant's guilt as to those offenses. During the defense case, appellant called several character type witnesses in his defenses but elected not to testify himself. As such, the credibility of the victims was a dominant issue in the court-martial.

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[3] The sexual assaults described by V1 were not charged. However, evidence of those incidents was admitted pursuant to Military Rule of Evidence 413.

LAW AND DISCUSSION

Self-Defense

In his fourth assignment of error, appellant complains that the military judge erred by failing to instruct the panel on the defense of self-defense with regard to Specification 1 of Additional Charge II. That specification alleges that in August of 2014, appellant assaulted V1, a commissioned officer, by punching her in the chest with his fist. We agree with appellant that a self-defense instruction was required and will grant appropriate relief in our decretal paragraph.

We review allegations that a military judge failed to provide a mandatory instruction de novo. *See United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The failure to give correct and complete instructions may constitute an error of constitutional magnitude. *Id.* (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)). When a properly preserved instructional error raises constitutional concerns, we test for prejudice using the "harmless beyond a reasonable doubt standard." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *see also Dearing*, 63 M.J. at 484, n.25 (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). An instructional error is harmless under this standard when the error did not contribute to the findings or sentence. *United States v. Kruetzer*, 61 M.J. 293, 298 (C.A.A.F. 2006) (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

Self-Defense is a special defense whose elements are found in Rule for Courts-Martial (R.C.M.) 916. With respect to a charge of assault consummated by a battery, the elements of self-defense are that the

accused: A) apprehended upon reasonable grounds that bodily harm was about to be inflicted wrongfully on the accused; and B) believed that the force that the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm. R.C.M. 916(c)(3); *see also United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008). An accused who is an aggressor is generally not entitled to claim self-defense. R.C.M. 916 (e)(4). However, self-defense is a fluid concept and the applicability of the defense may shift over the course of an affray. *See generally United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963). For example, an aggressor may regain the right to self-defense by withdrawing and indicating a desire for peace. *See United states v. Behenna*, 71 M.J. 228, 233 (C.A.A.F. 2012) (citing *Lewis*, 65 M.J. at 88); *see also* R.C.M. 916(e)(4). Moreover, even without withdrawing, an accused who wrongfully engages in an assault or a mutual affray may still claim self-defense where the initial victim escalates the encounter by using deadly force. *See, e.g., United States v. Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983) ("[I]f A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force defending himself against such an attack, even though he was originally the aggressor."); *Dearing*, 63 M.J. 483; *Lewis*, 65 M.J. at 85.[4] The right to self-defense terminates when the threat is removed.

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[4] "Generally speaking, a person in not entitled to use a dangerous weapon in self-defense where the attacking party is unarmed and commits a battery by means of his fists." *United States v. Richards*, 63 M.J. 622, 627 (Army Ct. Crim. App. 2006) (citing *United States v. Bransford*, 44 M.J. 736, 738 (Army Ct. Crim.

In accordance with R.C.M. 920, the military judge must instruct on any special defense, such as self-defense, reasonably raised by the evidence. R.C.M. 920; *see also Dearing*, 63 M.J. at 482. A defense is reasonably raised when there is some evidence supporting each element of the defense to which members of the panel could attach credit if they so desired. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). As long as there is "some evidence" of a possible defense, regardless of whether it is "compelling or convincing beyond a reasonable doubt," the military judge must provide an instruction on the defense even if it was not requested by either party. *Wolford*, 62 M.J. at 422 (citing *United States v. Jackson*, 178 (C.A.A.F. 2003) (holding the military judge does not weigh the credibility of the defense evidence, but rather only determines whether the defense was reasonably raised); *United States v. Thomas*, 20 U.S.C.M.A. 249, 254, 43 C.M.R. 89, 94 (1971) (stating generally that the reasonableness of the evidence is irrelevant to the military judge's determination of whether an instruction should be given). Moreover, there is no requirement for the accused to testify in order to earn an instruction on a special defense, only that there be some evidence, circumstantial or direct supporting the defense. *United States v. Curtis*, 1 M.J. 297, 298, n.1 (C.M.A.

App. 1996); *United States v. Bradford*, 29 M.J. 829, 832-33 (A.C.M.R. 1989). However, adding further nuance to such an exchange, R.C.M. 916(e)(2) allows a person who reasonably apprehends that "bodily harm" is about to be "wrongfully" inflicted upon them to offer, but not use, a means of force likely to produce death or grievous bodily harm to ward off such an attack. *Richards*, at 627-28 (stating appellant had right to offer knife to deter attackers using only fists).

1976); *see also United States v. Rose*, 28 M.J. 132, 135 (C.M.A. 1989). However, an instruction is not required if the evidence is wholly incredible or not worthy of belief. *United States v. Brown*, 6 U.S.C.M.A. 237, 19 C.M.R. 363 (1955); *United States v. Franklin*, 4 M.J. 635 (A.F.C.M.R. 1977).

Application of Self-Defense to the Charges at Issue

The facts supporting Specification 1 of Additional Charge II derived from the testimony of the V1. She testified that she suspected appellant of having an affair and wanted to see his phone. Appellant would not allow V1 to see the phone and they argued. According to V1, the argument then turned physical:

> We wrestled around in the living room and then we ended up going to the bedroom and I just wanted him to leave me alone. He was still coming at me so I went to the nightstand and I grabbed a pistol in self-defense and pointed it at him. At that point he quickly took it away from me and pushed me on the bed. And at that point knee[d] me on the side and he punched me in the chest.

The trial counsel and V1 then had the following exchange:

> Trial Counsel: Do you know how many times he punched you in the chest?
>
> V1: Multiple times. . . .
>
> V1: Just wanted him to go away and leave me alone and I was scared of him.

> Trial Counsel: What about what he was doing made you scared of him?
>
> V1: He was very aggressive and yelling and just red and his eyes get this icey-blue color when he gets really mad.
>
> Trial Counsel: Did you fear that he was going to kill you at that time?
>
> V1: I felt that he was going to hurt me.

On cross-examination, V1 testified that appellant was about three feet away from her and approaching when she grabbed the gun. She also admitted she was not sure if the gun was loaded but insisted that she did not place her finger on the trigger when she pointed it at appellant. On redirect V1 testified that she and appellant were already in a hostile interaction at the time she grabbed the gun. Aside from some medical evidence as to V1's injuries, there was no further testimony or evidence about the April 2014 assault.

At the conclusion of the case on the merits, appellant's civilian defense counsel requested a self-defense defense instruction for the specification in question. The military judge declined to give an instruction stating, "I do not believe there was any testimony about the accused honestly believing the amount of force he used was necessary to protect himself." Defense counsel never followed up and when the final version of the instructions was submitted for their review, neither counsel lodged any objection or requested any further instructions. However, during closing argument, civilian defense counsel did briefly

argue self-defense with regard to Specification 1 of Additional Charge II.

Prong 1 of Self-Defense: Reasonable Apprehension of Harm

In this case, we find that self-defense was raised by the evidence to the minimal standard required for instructions on special defenses. V1's testimony about events leading up to the charged assault was that they argued and then "wrestled around in the living room." The overall tenor of V1's testimony was that appellant was the aggressor in the conflict. As such, the limited facts available suggest that V1 was arguably within her rights to point the firearm at appellant to ward off further bodily harm as described by R.C.M. 916(e)(2). However, another possible interpretation of the facts was that V1 and appellant engaged in a mutual affray while wrestling around, an affray from which V1 successfully extracted herself and then escalated by brandishing a deadly weapon. Based on the rapidly evolving situation as described by V1, we find there was at least some evidence from which the panel might have concluded that appellant reasonably apprehended that he was in danger of wrongful death or grievous bodily harm, thus potentially satisfying the first element of self-defense.

Prong 2 of Self-Defense: Use of Force Necessary for Protection

Although a much closer call, we further find that there was at least some circumstantial evidence supporting the second element of self-defense. V1 testified that she was quickly disarmed and then thrown on the bed before being repeatedly punched in the

chest. There was no testimony as to how long the entire sequence took, nor was there any evidence of where the weapon went immediately after appellant disarmed V1. On these facts, a panel might have found appellant honestly believed he used only the amount of force necessary to disarm V1 and then ensure she could not retrieve the firearm. With regard to this element of self-defense, we are also concerned that the military judge seemed to have incorrectly believed appellant was required to testify. This is not the case. *See Rose*, 28 M.J. at 135.

We acknowledge that evidence supporting either element of self-defense is not particularly compelling nor convincing, however, that is not the standard. *See Wolford*, 62 M.J. at 422. The only question for the military judge was whether there was some evidence on which a panel could have found all elements of the defense if they were so inclined. *Brooks*, 25 M.J. at 178. In making that determination, military judges are expected to err on the side of providing the requested instruction. "Any doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 2025 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)).

Here, we find that the military judge erred in declining to instruct on self-defense. We also conclude that the error was not harmless beyond a reasonable doubt. Had the instruction been provided, the burden would have rested with the government to prove beyond a reasonable doubt the defense did not exist. R.C.M. 916. Given the limited evidence surrounding the assault in question, it is not entirely clear the government could have done so. As such, we cannot say

with confidence that the instructional error did not contribute to appellant's conviction for the offense in question. The government notes that civilian defense counsel ultimately argued self-defense in her closing statement, however, we find that fact does not mitigate the error because the panel lacked any guidance from the court on how they might apply counsel's argument to the facts of the case, much less on whether they were even allowed to do so. *See Wolford*, 62 M.J. at 419 ("Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process.") (citing *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979)).

Accordingly, finding error that was not harmless beyond a reasonable doubt, and in the interest of judicial economy, we set aside and dismiss Specification I of Additional Charge II. We will reassess appellant's sentence in our decretal paragraph.

Prior Consistent Statements

In his third assignment of error, appellant argues that the military judge abused his discretion by admitting V2's statements to a friend, CB, about the assault in September 2015 under Military Rule of Evidence (Mil. R. Evid.) 801(d)(1)(B). We disagree.

Prior to trial, appellant filed a motion under Mil. R. Evid. 412 seeking to admit a number nude photos and one sexually explicit video which V2 provided to,, or consensually created with, appellant over the course of several months following the physical and sexual assault in September of 2015. Appellant also sought to admit evidence that V2 continued her sexual relationship with appellant after the events in September 2015. According to that motion, the photos and the

video were constitutionally necessary to support the defense theory that V2 was not assaulted as alleged, was not in fear of appellant as she alleged, and that her accusations of physical and sexual assault were not credible. *See* Mil. R. Evid. 412. The military judge granted the motion in part, allowing appellant to introduce only one nude photo but allowing cross-examination on all of the photos, the video, and V2's ongoing sexual relationship with appellant.

At an Article 39(a), UCMJ, session following V2's testimony, the government indicated they would soon call CB as a witness and she would testify that V2 told her about being physically and sexually assaulted by appellant. According to CB, the conversation with V2 took place sometime shortly after the assaults occurred in September of 2015. Civilian defense counsel objected, arguing that allowing CB to testify was contrary to the purpose of Mil. R. Evid. 801(d)(B)(ii) and went beyond the intent of that rule. Civilian defense counsel did not explain how the testimony was contrary to the purposes of the rule, nor did she make any argument with regard to her intent in pursing the photos, video, and sexual relationship in cross-examination. The government countered that civilian defense counsel attacked V2's credibility on other grounds when she questioned V2 extensively about the nude photos, the video and her continued sexual relationship with appellant. The government argued that the clear import of civilian defense counsel's line of questioning was that V2 did not act like a victim of a physical and sexual assault and therefore, she must not be a victim of sexual assault.

After hearing argument from the parties, the military judge ruled that appellant's line of questioning on

V2' s counter-intuitive behavior was an attack on her credibility on "another ground" as contemplated by Mil. R. Evid. 80l(d)(l)(B)(ii). He further found that the statements made to CB were proper rehabilitation under the rule. The military judge also conducted a Mil. R. Evid. 403 balancing test and found no basis to exclude CD's testimony.

When CB was called as a witness, defense counsel again objected, this time arguing that CB' s testimony was not relevant to rehabilitate anything that was asked on cross-examination of V2. The military judge again overruled the objection finding CB' s testimony was relevant as a "prior consistent statement with the declarant's testimony and is offered to rehabilitate the witness' testimony on other grounds." CB then testified that sometime shortly after the September assault and definitely prior to when she visited V2 in February of 2016, she spoke with V2 on the telephone and V2 told her appellant had physically and sexually assaulted her. CB did not offer any further detail on their conversation.

We review a military judge's decision to admit evidence under Mil. R. Evid. 801(d)(1)(B) for an abuse of discretion. *United States v. Finch,* 79 M.J. 389, 394 (C.A.A.F. 2020) (citing *United States v. Frost,* 79 M.J. 104, 109 (C.A.A.F. 2019)). Even where a military judge errs in admitting a prior consistent statement, we will not provide relief unless the error materially prejudiced a substantial right of appellant. *Id.* at 391.

In accordance with Mil. R. Evid. 801(d)(1)(B), a prior statement by a witness is not hearsay when the declarant testifies at trial and is subject to cross-examination about the statement, provided the statement is consistent with the declarant's testimony and

is offered to rebut an express or implied charge of recent fabrication, or an improper influence or motive. Mil. R. Evid. 801(d)(l)(B)(i). Further, such statements are not hearsay if offered to rehabilitate the declarant' s testimony when it has been attacked on a ground not listed in Mil. R. Evid. 801(d)(l)(B)(i). Mil. R. Evid. 801(d)(l)(B)(ii); *Finch,* 79 M.J. at 396. The two prongs of Mil. R. Evid. 801(d)(l)(B) are mutually exclusive, therefore, a single statement may not be admitted under both sections. *United States v. Ayala,* 81 M.J. 25, 28 (C.A.A.F. 2021) ("[P]rior consistent statements may be eligible for admission under either (B)(i) or (B)(ii) but not both.") (citing *Finch,* 79 M.J. at 396).

There are three key points of analysis for a military judge assessing the admissibility of a prior statement that otherwise meets the rule's predicate requirements of testimony and cross-examination. First, the military judge must determine whether the witness has been attacked on one of the grounds listed in Mil. R. Evid. 801(d)(l)(B). *See Finch,* 79 M.J. at 396; *see also United States v. Campbell,* ARMY 20180107, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 6 Mar. 2020) (mem. op.). Second, the judge must determine that the prior statement offered is relevant to rebut the attack made under either (B)(i) or (B)(ii). A prior statement is relevant under the rule if it is mostly consistent with the declarant's testimony and sufficiently specific to respond only to the grounds upon which the declarant was attacked. *See Finch,* 79 M.J. at 395-96 (citing *United States v Muhammad,* 512 F. App'x 154, 166 (3rd Cir. 2013)); *United States v. Palmer,* 55 M.J. 205, 208 (C.A.A.F. 2001). Third, with regard to (B)(i), the military judge must determine whether the consistent statement offered was in fact prior to whatever

evidence constituted the attack on the witness. *Frost,* 79 M.J. at 110 (holding the prior statement must precede the motive to fabricate it is offered to rebut but need not precede all alleged motives to fabricate) (citing *United States v. Allison,* 49 M.J. 54, 57 (C.A.A.F 1998)). While (B)(ii) does not specifically require that a prior statement predate the predicate impeachment evidence, the timing of a statement offered under this section remains "highly relevant" and "will often be key to determining" its admissibility. *United States v. Finch,* 78 M.J. 781, 787 (Army Ct. Crim. App. 2019).

In this case, V2 testified and was subject to cross-examination. The record shows that appellant questioned V2 about her continued sexual relationship with appellant after the physical and sexual assaults in September 2015. Appellant also questioned V2 extensively about the sexually explicit digital media that she either provided appellant, or consented to him creating, after the September 2015 physical and sexual assaults. The military judge found that this line of questioning was an attack on V2's character on "another ground." However, we find that conclusion by the military judge was in error because the witness was not attacked on "other grounds" but rather on grounds specified in Mil. R. Evid. 801(d)(l)(B)(i).

We find that the clear import of civilian defense counsel's cross-examination, as proffered in appellant's pre-trial Mil. R. Evid. 412 motion and argued to the panel in closing, was that V2' s counter-intuitive behaviors demonstrated the physical and sexual assaults she testified to on direct did not take place and thus her testimony was fabricated. As such, we find this line of questioning of V2 opened the door for the government to introduce prior consistent statements

by V2. Because the testimony was properly admissible under Mil. R. Evid. 801(d)(1)(B)(i), any error by the military judge in applying the wrong section of the rule was harmless. *See United States v. Norwood,* 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W)e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'") (quoting *United States v Bess,* 80 M.J. 1, 12 (C.A.A.F. 2020).

Next, we find that V2 told CB about appellant's physical and sexual assault sometime shortly after they occurred. This would have been prior to the creation of the bulk of the sexually explicit digital media, as well as the on-going sexual relationship. Therefore, the military judge correctly concluded V2' s statement to CB was prior to the conduct attacked on cross-examination as evidence of recent fabrication.

Finally, CB testified that V2 told her that appellant physically and sexually assaulted her in September of 2015. Although lacking detail, this testimony was consistent with V2 's testimony on direct that she had been physically and sexually assaulted by appellant at that time. The prior consistent statement also directly rebutted the implication that V2 had fabricated the September 2015 physical and sexual assaults at some point after they occurred. As such, we find the prior consistent statement offered through CB was relevant and fit squarely within the intent of Mil. R. Evid. 801(d)(l)(B)(i). Accordingly, we find the military judge did not abuse his discretion in admitting the statements of CB as a prior consistent statement.

CONCLUSION

Specification 1 of Additional Charge II is SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED.

Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann,* 73 M.J. 11, 15-16 (C.A.A.F. 2013). We also find the totality of the *Winckelmann* factors to favor reassessment by this court. 73 M.J. at 14-15. Therefore, only so much of the sentence as provides for a dismissal, confinement for sixteen years and 11 months, a reprimand, and total forfeiture of all pay and allowances, are AFFIRMED.

Judge PENLAND and Judge ARGUELLES concur.

FOR THE COURT:

/s/ James W. Herring, Jr.
JAMES W. HERRING, JR
Clerk of Court